IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-826, 79-827

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

JOINT REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

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This reply brief is submitted jointly by American Broadcasting Companies, Inc., CBS Inc., Metromedia, Inc., National Radio Broadcasters Association (Petitioners in No. 79-826), National Association of Broadcasters, National Broadcasting Company, Inc., WBNS TV Inc., and RadiOhio Incorporated (Petitioners in No. 79-827) in response to the briefs in opposition to the petitions for certiorari filed by WNCN Listeners Guild, *et al.* ("WNCN Respondents") and Office of Communication of the United Church of Christ, *et al.* ("UCC Respondents").

I.

The petitions for certiorari show that this case warrants plenary review because it presents major statutory and constitutional issues concerning the appropriateness of government regulation of broadcast licensee program choices. The oppositions implicitly concede that important statutory and constitutional issues are involved, but dispute that any new fundamental legal issues are presented.

The elaborate *en banc* opinion of the court of appeals, covering over 50 pages of discussion and analyses,[1] belies any suggestion that the questions involved are unimportant or limited in scope. Against the background of an extended and sharp disagreement over regulatory policy between the lower appellate court and the Commission, the decision below and the earlier program format cases in the District of Columbia Circuit represent the first judicial declaration that the "public interest" standard of the Communications Act requires the Commission to regulate changes in the entertainment and informational formats of individual radio station licensees. In short, this case falls directly in the line of cases in which this Court has exercised its authority to clarify questions concerning Commission regulation in the sensitive area of program content. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) ("*CBS* v. *DNC*"), *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) ("*Red Lion*") and *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video*"). The decision below also substitutes judicially formulated policy for administrative agency judgment in conflict with the mandate of this Court in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*FCC* v. *NCCB*").

[1] *WNCN Listeners Guild* v. *FCC*, Nos. 76-1692, 76-1793, and 77-1951 (D.C. Cir. June 29, 1979). The opinion is reprinted in Appendix A of the Government's petition ("FCC App. A").

II.

In our petitions we demonstrated that the regulation of program format changes required by the court below finds no support in any provision of the Communications Act, the legislative history or any other authority. Respondents, however, portray the decision below as being narrowly drawn along traditional lines.[2] The simple syllogism they depict is founded on the Commission's statutory responsibility to pass upon broadcast applications under the general "public interest" standard contained in the basic licensing sections of the Communications Act.[3]

This analysis fails, however, because it assumes that embedded somewhere in the public interest standard is the specific requirement that the Commission review and regulate the selection of entertainment and informational programming formats. In fact, the decision of the court of appeals represents a radical departure from traditional standards. The court below identified no preexisting Commission policy supporting its decision. As the Commission observed in its Notice of Inquiry, "[f]or over 40 years . . . broadcast applicants have been free to select their own program formats."[4] Respondents fail

[2] *See, e.g.*, UCC Opp. 21-22; WNCN Opp. 4, 20-23.

[3] 47 U.S.C. §§ 309(a), 309(e) and 310(d). The "clear statutory mandate" relied upon by WNCN Respondents (WNCN Opp. 26) is, in reality, nothing more than an implication they draw from these general statutory provisions which require the Commission to apply the public interest standard to certain broadcast applications and to hold an evidentiary hearing when such applications present material questions of fact.

[4] *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580, 585 (1976).

to cite any case prior to the recent court of appeals decisions in which the Commission scrutinized specific entertainment formats in a licensing or transfer context. Nor do any other materials relied on by respondents reflect a Commission determination to engage in regulation of program formats.[5] As we have shown in our peti-

[5] In the *Report on Public Service Responsibility of Broadcast Licensees* (the "Blue Book"), cited by UCC Respondents (UCC Opp. 5-6, 8 n.7, 29), the Commission did not conclude that it should regulate the entertainment formats of its licensees. It merely decided to consider the quantity of a broadcaster's noncommercial, local-live, and public affairs programming in granting or denying licenses, and did not dictate the subject matter of the programming or require adherence to a particular format.

The UCC Respondents' suggestion (UCC Opp. 31) that the Commission in 1935 determined that it had the power to require licensees to adopt particular program formats is completely incorrect, and even their quotation of the Commission's 1935 Report is inaccurate. The quoted portion juxtaposes two sentences without indicating—by ellipses or otherwise—that intervening material was omitted. The omitted material, shown below in italics, demonstrates clearly that the Commission was directly opposed to requiring that broadcast stations be specialized either by the subject matter treated or by the segment of the audience served:

> "The Commission feels that present legislation has the flexibility essential to attain the desired ends without necessitating at this time any changes in the law.
>
> *Among those appearing for the non-profit organizations were representatives of labor, education, religion and civic groups. The labor representatives did not favor a specific allocation of facilities but were interested mostly in the maintenance of the facilities that they now enjoy. Representatives of various educational institutions seemed to favor the present system while offering certain improvements which apparently can be accomplished under existing law. Most of the representatives of religious groups seem to favor the continuance of the present system. In general, representatives of non-profit groups expressed the opinion that the best results would be brought about by cooperation between the broadcasters and their organizations under the direction and supervision of the Commission, and not by an allocation of fixed percentages.*
>
> *RECOMMENDATION:*
>
> *THE FEDERAL COMMUNICATIONS COMMISSION RESPECTFULLY RECOMMENDS THAT AT THIS TIME NO FIXED PERCENTAGES OF RADIO BROADCAST FACILITIES BE ALLOCATED BY STATUTE TO PARTICULAR TYPES OR KINDS OF NON-PROFIT RADIO PROGRAMS OR TO PERSONS IDENTIFIED WITH PARTICULAR TYPES OR KINDS OF NON-PROFIT ACTIVITIES.*
>
> *REASONS:*
>
> There is no need for a change in the existing law to accomplish the helpful purposes of the proposal."

Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934 at 4-5 (1935).

tions,[6] the Commission in the past has repeatedly declined to engage in such regulation.

Respondents also urge—whatever the preexisting practice—that the Commission must consider program diversity in judging renewals or assignments under the public interest standard. UCC Respondents suggest that "the Court of Appeals simply held that the Commission could not abdicate to the marketplace its statutory responsibility to make an affirmative public interest determination."[7] In fact, even when the Commission has the power to adopt specific requirements under the public interest standard, it may appropriately make a determination not to regulate programming and instead to rely on the marketplace to achieve Commission goals. A determination to rely on the marketplace and individual licensee judgments in such circumstances hardly constitutes "abdication" of Commission responsibilities. Ironically, the WNCN Respondents suggest that the Commission's "total reliance on marketplace forces flies in the face of the language in [this Court's decision in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953)], which limits the agency to 'drawing on competition for complementary or auxilliary [sic] support' . . . ."[8] In fact, *RCA* merely

[6] *See* ABC *et al.* Petition 15-16.

[7] UCC Opp. 26-27.

[8] WNCN Opp. 26.

held that, in licensing common carriers, the Commission may not assume that Congressional policy necessarily favors competition, but the Court also held that the Commission may rely on competition if it determines "that competition would serve some beneficial purpose such as maintaining good service and improving it." [9]

In broadcasting, the Commission not only has the discretion to rely on the marketplace to satisfy statutory objectives, in the area of programming the Act contemplates free competition and reliance on individual licensee judgments to the maximum possible extent. In *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), this Court held that

> "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public."

See also CBS v. *DNC* and *Midwest Video*. Thus, competition among broadcasters through their program formats and individual licensee choice, not regulation, is precisely what Congress contemplated when it enacted the Communications Act, and is the same approach followed by the Commission up to the recent court of appeals decisions.[10]

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[9] 346 U.S. at 97.

[10] *See* ABC *et al.* Petition 14-16; NAB *et al.* Petition 15 n.19. Contrary to UCC Respondents' suggestions (UCC Opp. 29) the Commission does not disagree with this view of the legislative history. Indeed, before the court of appeals the Commission relied on the same legislative history on which petitioners rely. Brief for Respondents Federal Communications Commission and United States of America in *WNCN Listeners Guild* v. *FCC*, Nos. 76-1692, 76-1793 and 77-1951 at 35-37 (D.C. Cir. June 29, 1979).

The suggestion of the WNCN Respondents (WNCN Opp. 26) that the Commission "concedes that the marketplace has failed" is nothing short of remarkable. While the Commission agreed that the marketplace is not infallible, it found that:

> "[T]he marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (*i.e.*, promoting the greatest diversity of listening choices for the public) or in economic terms (*i.e.*, maximizing the welfare of consumers of radio programs)."

Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858, 863 (1976) (*"Policy Statement"*), *reconsideration denied*, 66 F.C.C.2d 78 (1977).

The Commission's longstanding decision to refrain from regulating radio entertainment formats, based upon the censorial nature of that regulation, should be given great weight, particularly since, as this Court in *FCC* v. *NCCB* found, " '[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.' " [11]

UCC Respondents suggest that Commission intrusion into programming is consistent with the Communications Act since it does not involve "public access" or Commission "editing" of particular program material.[12] However, this reflects an insupportably narrow reading of this Court's decisions in *CBS* v. *DNC* and *Midwest Video*. As this Court found in *CBS* v. *DNC*, "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." [13] Last term, in *Midwest Video*, this Court reaffirmed "the policy of the Act to preserve editorial control of programming in the licensee . . . ." [14] The decision of the court of appeals clearly denies licensees the freedom of choice which this Court has held to be basic to the statutory scheme.[15]

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[11] 436 U.S. at 796-97, *quoting Nat'l. Citizens Comm. for Broadcasting* v. *FCC*, 555 F.2d 938, 961 (D.C. Cir. 1978).

[12] UCC Opp. 37, 43. The assertion that "[u]nder the Court of Appeals decision, licensees are neither prohibited from broadcasting, nor required to broadcast, any particular programming or program format . . ." (WNCN Opp. 30) is indefensible. Absent Commission approval of a new format under the standards articulated by the court of appeals, a licensee would indeed be required to adhere to the old format.

[13] 412 U.S. at 110.

[14] 440 U.S. at 705.

[15] It is perhaps noteworthy that the approach of the Commission in the decisions relied on by UCC Respondents (UCC Opp. 38 n.36,

In summary, while the WNCN Respondents claim that the decision below requires that the Commission merely "take a look" at format changes,[16] and represents "a straightforward implementation of the regulatory scheme," [17] there is nothing limited, straightforward or traditional about a decision which directs the Commission to foresake a longstanding policy that successfully relied on individual licensee judgments and competitive marketplace conditions, and to begin direct and detailed review and regulation of the entertainment and informational programming of individual broadcast station licensees. In dramatically reversing this tradition, the court of appeals has blatantly substituted its own policy judgment, contrary to this Court's decision in *FCC* v. *NCCB*, and inaugurated an alternative approach that the Commission has repeatedly found to be contrary to the governing statute and overriding First Amendment interests.

The importance of the decision below is underscored by the fact that the court of appeals not only reiterates the court's format requirements in the context of assignments, it extends those requirements to renewals involving changes in informational or entertainment formats.[18] Since every radio station must submit a renewal application every three years, these requirements must now be applied to all changes in broadcasting formats undertaken by radio licensees.[19]

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para. 1) as evidence of permissible Commission program regulation was specifically disapproved by the Second Circuit as impermissibly involving the Commission in program choice. *Nat'l. Ass'n. of Independent Television Producers and Distrib.* v. *FCC*, 516 F.2d 526, 540-41 (2d Cir. 1975).

[16] WNCN Opp. 4.

[17] WNCN Opp. 24.

[18] FCC App. A at 20a.

[19] Respondents' repeated emphasis on the limited circumstances in which this policy will ultimately be applied (*e.g.*, UCC Opp. 26-27; WNCN Opp. 24) is not reassuring. Because the policy will now reach all renewal applications, its potential impact cannot be realistically measured by the number of assignment cases actually designated for hearing up to the present date. Moreover, such a measure fails to account for those situations in which broadcasters either decide not to innovate for fear of being locked into a "unique" format or decide not to change format for fear of becoming entangled in an expensive and protracted hearing, or the extensive and time consuming complaint and petition procedures that typically precede the hearing stage. Just as significantly, many cases are settled out of fear of the lengthy regulatory proceedings which the court of appeals requires.

Finally, this case threatens to undermine other important regulatory objectives. Indeed, at a time when the federal government in general and the Commission in particular are seeking ways to de-emphasize regulatory burdens,[20] this case conspicuously points in the opposite direction by calling for more expansive regulation—a consequence that is, in no small measure, aggravated by the sensitive nature of the program content regulation involved.

III.

The ultimate constitutional question of whether the First Amendment would be violated by the form of regulation mandated by the court of appeals is, manifestly, an independent issue of sufficient gravity and consequence to warrant review in this Court. The lower court's decision threatens to drastically alter a regulatory system which for almost half a century has entrusted broadcast stations with basic responsibility for selecting and presenting the entertainment and informational formats they deem most responsive to public needs and tastes. Our petitions have set forth at length the First Amendment implications of these changes for broadcast pro-

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[20] In a recent notice of inquiry the Commission has proposed to "deregulate" broadcast radio. *See Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636 (1979).

gramming and licensee decision-making.[21] If this Court does not grant review to prevent these unconstitutional intrusions, the error of the court below will deeply permeate future Commission decision-making.

While respondents argue at length over the implications of *Red Lion*, *CBS* v. *DNC* and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) for this case, they completely fail to show that the First Amendment issues here are not important or that they do not warrant review by this Court.[22] Moreover, respondents fail to even attempt rebuttal of petitioners' First Amendment arguments based on the facts of this case. As we have shown in our petitions, the court of appeals failed to give due deference to the Commission's judgment in this sensitive First Amendment area; the court of appeals mandate, if allowed to stand, will require the Commission to make delicate determinations that are by nature highly subjective; and the court of appeals decision will chill program format innovation and experimentation.

IV.

WNCN Respondents contend that review is unnecessary because it is unlikely in the future that there will be a conflict in the circuits, owing to the fact that Commission licensing decisions must be appealed to the District of Columbia Circuit under 47 U.S.C. § 402(b). WNCN Opp. 36. This, however, avoids the more compelling point; to wit, because of the very existence of Section 402(b), it is

[21] ABC *et al.* Petition 18-24; NAB *et al.* Petition 20-24.

[22] As decisions of this Court make clear, licensees are primarily charged with determining the needs and interests of their audiences and making programming judgments as trustees for the public. Under the policy formulated by the court of appeals, and unlike the programming responsibilities under the fairness doctrine approved in *Red Lion*, the licensee is not afforded the latitude to make its own program judgments and to select its own programming. "[The fairness doctrine] contemplates a wide range of licensee discretion." *Midwest Video*, 440 U.S. at 705 n.14.

unlikely that the questions presented in this case will arise in any other circuit. Accordingly, this factor heightens, rather than diminishes, the need for review.[23]

CONCLUSION

For the reasons stated above and in the petitions for certiorari of the undersigned parties, the writs should be granted.

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[23] ABC *et al.* Petition 21-23; NAB *et al.* Petition 20-24. Both the WNCN Respondents and the UCC Respondents recognize that the court of appeals did not rest its decision on a procedural ground. UCC Opp. 20; WNCN Opp. 34. Nonetheless, the WNCN Respondents argue that review should be denied because of alleged procedural deficiencies in the record before the Commission. WNCN Opp. 21-25. Since they concede that the lower court specifically declined to reject the Commission's *Policy Statement* on this ground, and did not remand the matter to the agency for further proceedings, it is difficult to understand the relevancy of this factor in the context of whether this Court should review the basic statutory and constitutional issues presented. If review were denied by this Court, the Commission would be left with no alternative but to follow the instructions of the court of appeals. Deniel of review would not result in a remand to the Commission to reconsider the matter, which is what would follow from a determination of procedural error. We note that the UCC Respondents do not urge that review be denied on this procedural ground.

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